

EV 07-0167-C Shara Mitchell vs Old National  
Judge Richard L. Young

Signed on 02/09/10

**NOT INTENDED FOR PUBLICATION IN PRINT**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
EVANSVILLE DIVISION

SHARA MITCHELL,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 3:07-cv-00167-RLY-WGH
	)	
OLD NATIONAL BANK,	)	
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
EVANSVILLE DIVISION

SHARA MITCHELL,	)	
Plaintiff,	)	
	)	
vs.	)	3:07-cv-167-RLY-WGH
	)	
OLD NATIONAL BANK,	)	
Defendant.	)	

**ENTRY ON DEFENDANT’S MOTION FOR SUMMARY JUDGMENT and  
DEFENDANT’S MOTION TO STRIKE**

Plaintiff, Shara Mitchell (“Plaintiff”), is a former employee of Old National Bank (“ONB” or the “Bank”). Plaintiff alleges that ONB’s decision to eliminate her job position and failure to hire her for another position constituted gender discrimination, in violation of Title VII of the Civil Rights Act of 1964, as amended in 1991, 42 U.S.C. § 2000(e) *et seq.* (“Title VII”). ONB now moves for summary judgment and to strike Plaintiff’s Statement of Material Facts. For the reasons set forth below, the court **GRANTS** ONB’s motion for summary judgment and **GRANTS** ONB’s motion to strike.

**I. Motion to Strike**

Before addressing the facts of the present motion, the court elects to address ONB’s Motion to Strike Plaintiff’s Statement of Material Facts.

In response to ONB’s motion for summary judgment, Plaintiff filed two documents: (1) a Response to Defendant Old National Bank’s Motion for Summary Judgment (“Response Brief”), and (2) a Response to Defendant’s Statement of Material Facts in Dispute. Plaintiff’s Response Brief includes a section entitled “Genuine Issues of Material Fact Precluding Summary

Judgment.” Thus, Plaintiff submits two sets of facts in response to ONB’s motion for summary judgment. ONB moves to strike Plaintiff’s Response to Defendant’s Statement of Material Facts in Dispute because a separate response to Defendant’s Statement of Material Facts is not authorized under Local Rule 56.1(b), and because Plaintiff’s filing of a separate response to Defendant’s Statement of Material Facts seeks to circumvent the page limits imposed by Local Rule 7.1(c). Plaintiff responds that to the extent her filings exceed the page limits imposed by Local Rule 7.1(c), she moves for leave to file an extended brief as required by the rule. Plaintiff, however, fails to provide “extraordinary and compelling reasons” for doing so. *See* Local Rule 7.1(c) (“Permission to file a brief in excess of these page limitations will be granted only upon extraordinary or compelling reasons.”).

The court has read and reviewed Plaintiff’s Response Brief and her separately filed Response to Defendant’s Statement of Material Facts in Dispute. The court agrees with ONB that Plaintiff has indeed violated Local Rule 56.1(b) and Local Rule 7.1(c). Plaintiff’s violations are not excusable under the local rules. Moreover, Plaintiff did give her recitation of the facts in her Response Brief, and thus, the court’s ruling in favor of ONB will not prejudice her. Accordingly, ONB’s Motion to Strike Plaintiff’s Statement of Material Facts is **GRANTED**.

## **II. Facts**

### **A. Background**

1. ONB is a full-service financial institution that offers a wide variety of banking and other services to its customers throughout a multi-state area. (Declaration of Don Schroeder, Defendant's Ex. A ("Defendant's Ex. A"), ¶ 3).
2. In the late 1990s, ONB sought to raise its profile in the mortgage sector to meet customer demand and potentially capture additional growth. (*Id.* ¶ 5). ONB therefore set up a separate division (Old National Mortgage ("ONM")), consolidated the mortgage-related work that already existed at the Bank into a newly formed division, and installed a new and separate leadership team with mortgage experience (as opposed to more general or broader bank experience) to manage the operation. (*Id.*). The division was then divided into a variety of groups, including operations, sales, and secondary marketing. (Deposition of Shara Mitchell, Defendant's Ex. B ("Defendant's Ex. B") at 57).
3. In July 2003, Plaintiff was recruited to join ONM in an operations role by divisional Chief Operations Officer Richard Molloy. (*Id.* at 37-38, 53).
4. Plaintiff ascended through the ranks at ONM rapidly. Her first job was Vice President and Manager of Business Support. (*Id.* at 53). She was promoted to Vice President of Business and Strategic Development and then again to Senior Vice President of Mortgage Servicing. (*Id.* at 64). After a short stint in that role, Plaintiff was promoted again to the position of Senior Vice President and Director of Mortgage Operations. (*Id.* at 65). Plaintiff was also a member of ONM's Executive Leadership Group, along with Richard Molloy and others. (*Id.* at 58).

**B. ONM Disbands**

5. By 2006, the division in which she worked was failing to meet the goals set for it by ONB. (*Id.* at 61-62).
6. Consequently, Bob Jones (“Jones”), the Bank’s newly installed CEO, began to look for ways to disband the ONM division and integrate the mortgage work back into ONB. (Defendant’s Ex. A, ¶ 7).
7. One of the first steps taken was to dismiss Mark Faris, the original head of ONM. (Defendant’s Ex. B at 60-61). Although Richard Molloy assumed Mark Faris’ role, his departure soon followed. (*Id.* at 61). Mike Hinton followed Richard Molloy’s tenure, but he likewise lost his job. (*Id.* at 14, 61).
8. As the leadership roles within ONM were being eliminated, the Bank began moving mortgage functions back into existing departments. (Defendant’s Ex. A, ¶ 7).
9. What remained of ONB’s mortgage operations (including Plaintiff) was placed under the direction of Annette Hudgions (“Hudgions”), who was an Executive Vice President of the Bank. (Declaration of Annette Hudgions, Defendant’s Ex. I (“Defendant’s Ex. I”), ¶ 14).
10. Hudgions led the group responsible for the Bank’s computer operations, loan operations, check processing, and deposit operations. (*Id.* ¶¶ 3, 4). In addition, Hudgions handled mortgage operations before the creation of ONM. (*Id.* ¶ 5).
11. During this process, much like Hudgions being placed in charge of the returning piece of mortgage operations, ONB’s Treasurer, Jim Ryan (“Ryan”), was placed in charge of secondary marketing. (Defendant’s Ex. B at 121; Deposition of Jim Ryan, Defendant’s Ex. E (“Defendant’s Ex. E”) at 19); Declaration of Jim Ryan, Defendant’s Ex. F

(“Defendant’s Ex. F”) ¶ 10). Among other things, this made Ryan responsible for hiring a secondary marketing manager – a position which had been vacant since December 2005. (Defendant’s Ex. F, ¶¶ 10, 12, 13).

12. Don Schroeder (“Schroeder”), Northwest Regional President/Central Region CEO for the Bank, inherited increased duties as well – specifically assuming responsibilities for the mortgage division’s sales people/mortgage loan officers. (Defendant’s Ex. A, ¶ 9).

**C. Hudgions Recommends That Plaintiff’s Job Be Eliminated**

13. Once the mortgage operations functions were rolled back into the Bank, Hudgions began to evaluate executive staffing needs. (Deposition of Annette Hudgions, Defendant’s Ex. D (“Defendant’s Ex. D”) at 55-57; Defendant’s Ex. I, ¶¶ 14, 15).
14. As it stood, Hudgions now had two vice presidents of operations – Julie Williams (“Williams”), the incumbent Senior Vice President of Operations for the Bank, and Plaintiff, who had migrated over as another Senior Vice President of Operations from the mortgage division. (Defendant’s Ex. I, ¶ 15; Defendant’s Ex. D at 55-57).
15. Hudgions’ evaluation revealed that there was no need for separate senior vice presidents of bank operations and mortgage operations. (Defendant’s Ex. D at 56; Defendant’s Ex. I, ¶ 16). While Hudgions believed Plaintiff to be a good performer in mortgage operations, she ultimately determined that this narrower role could be absorbed by the banking senior vice presidents who reported to her, including Williams. (Defendant’s Ex. D at 55-57; Defendant’s Ex. I, ¶¶ 15, 16). These individuals were already overseeing similar (and broader) functions for the Bank itself, and Hudgions concluded that they were best able to handle the combined functions, especially as Plaintiff had never worked

in bank operations for ONB. (Defendant's Ex. D at 56; Defendant's Ex. I, ¶ 17).

Therefore, Hudgions recommended that Williams assume the mortgage operations' application, processing, and post-closing responsibilities, and that Senior Vice President, Butch Schutte, who was in charge of the Bank's project management/technology functions, take over the mortgage-related technology and project management responsibilities. (Defendant's Ex. B at 82-83; Defendant's Ex. I, ¶ 17).

16. These recommendations were accepted by Jones, and on July 25, 2006, Plaintiff was informed that her mortgage position had been eliminated. (Defendant's Ex. I, ¶ 18; Defendant's Ex. B at 81).

**D. Dale Litcher Is Hired As Secondary Marketing Manager**

17. In December 2005, Nathan Vogt, the Secondary Marketing Manager, resigned his employment. (Defendant's Ex. F, ¶ 12).
18. A search for his replacement began, with Ryan ultimately being placed in charge of that search. (Defendant's Ex. D at 67; Defendant's Ex. E at 34-36; Defendant's Ex. F, ¶ 12).
19. Ryan was looking for a candidate who not only had secondary marketing experience but also had a broad and deep background in all aspects of the mortgage business, including sales. (Defendant's Ex. F, ¶ 12).
20. The job was posted on the internet (via ONB's publicly accessible home page) and on ONB's intranet. (Declaration of Kendra Vanzo, Defendant's Ex. J ("Defendant's Ex. J"), ¶ 6).
21. Plaintiff did not apply for the position. (Defendant's Ex. B at 85, 168-69).

**1. Dale Litcher Applies for the Secondary Marketing Position**

22. Dale Litcher (“Litcher”) submitted his resume in response to an internet posting and filled out an application on July 12, 2006. (Deposition of Dale Litcher, Defendant’s Ex. G (“Defendant’s Ex. G”) at 4).
23. Ryan first interviewed Litcher by telephone, and, based on the strength of that interview and Litcher’s broad mortgage experience, Ryan recommended Litcher be interviewed in person by other Bank personnel,<sup>1</sup> including Hudgions, which occurred on July 19, 2006. (Defendant’s Ex. F, ¶ 1; Defendant’s Ex. D at 73-74). Following favorable feedback from those interviews, Ryan likewise interviewed Litcher in person. (Defendant’s Ex. E at 49, 52; Defendant’s Ex. G at 24; Defendant’s Ex. F, ¶ 15).

**2. Plaintiff Inquires About the Position But Does Not Apply**

24. After being notified that her position was being eliminated, Plaintiff asked Hudgions why she was not offered the secondary marketing position – a job for which she had neither applied nor previously expressed an interest. (Defendant’s Ex. B at 115). Hudgions responded by telling Plaintiff that she could post for the position if she wanted. (*Id.* at 81).
25. Following that conversation, Plaintiff raised the position with Susan Wilson (“Wilson”), a human resources representative. (*Id.* at 85). Wilson opined that Plaintiff would not want to apply for the position, in part, because of its lower pay. (*Id.*; Deposition of Susan Wilson, Defendant’s Ex. K (“Defendant’s Ex. K”) at 24).
26. Wilson provided Plaintiff with information on how to apply online for the position.

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<sup>1</sup> Plaintiff also interviewed candidates for that position, but not Litcher. (Defendant’s Ex. B at 90).

(Defendant's Ex. B at 86; Defendant's Ex. K at 24).

27. Despite admitting that Ryan was the ultimate decision maker with regard to who would be hired for the position, Plaintiff never contacted Ryan or notified him of her interest in the job. (Defendant's Ex. B at 90; Defendant's Ex. F, ¶ 17).

### **3. Dale Litcher Is Hired for the Secondary Marketing Position**

28. After reviewing resumes and interviewing candidates who had applied for the position, Ryan determined that Litcher was the best fit for the secondary marketing position. (Defendant's Ex. E at 49; Defendant's Ex. F, ¶ 16).
29. Litcher was offered the job in August 2006. (Defendant's Ex. F, ¶ 16).

### **III. Summary Judgment Standard**

Summary judgment is proper where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(c). A genuine issue of material fact exists if “there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Some alleged factual dispute that does not rise to a genuine issue of material fact will not alone defeat a summary judgment motion. *Id.* at 247–48.

In deciding whether a genuine issue of material fact exists, the court views the evidence and draws all inferences in favor of the nonmoving party. *Miranda v. Wis. Power & Light Co.*, 91 F.3d 1011, 1014 (7th Cir. 1996). However, when a summary judgment motion is made and supported by evidence as provided in Rule 56(c), the nonmoving party may not rest on mere

allegations or denials in its pleadings but “must set forth specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e).

#### **IV. Discussion**

Plaintiff alleges that she was discriminated on the basis of her gender when she was relieved of her job as a mortgage executive after the Bank disbanded the mortgage division and the division’s leadership team. She further claims that the Bank discriminated against her when it failed to automatically place her in the lower-level secondary marketing position. The court now turns to its discussion.

##### **A. The Elimination of Plaintiff’s Position**

Plaintiff does not have direct evidence of discrimination. Thus, she must proceed under the indirect method of proof. This requires her to show: (1) she is a member of a protected class; (2) she was performing her job to her employer’s legitimate expectations; (3) she suffered an adverse employment action; and (4) she was treated less favorably than similarly situated male employees. *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002). The fourth element of the prima facie case is modified in the mini-reduction-in-force context – i.e., where, as here, one or two employees are terminated and their responsibilities are absorbed by other members of the workforce. *Griffin v. Sisters of St. Francis, Inc.*, 489 F.3d 838, 845 (7th Cir. 2007); *Micas v. Health Cost Controls of Ill., Inc.*, 209 F.3d 687, 693 (7th Cir. 2000). In this circumstance, Plaintiff is required to show that all of her duties were absorbed by individuals outside of her protected class. *Petts v. Rockledge Furniture LLC*, 534 F.3d 715, 725-26 (7th Cir. 2008) (female sex discrimination plaintiff failed to establish prima facie case when at least some of her duties were taken over by women); *Michas*, 209 F.3d at 693.

Here, the undisputed evidence reflects that Plaintiff's position was eliminated when Hudgins concluded that she did not need Plaintiff as a second or additional Senior Vice President of Operations for the combined operations group. Since her position was the only one eliminated at that time, she must show that all of her job duties were transferred to male employees. Plaintiff admits that her job duties were transferred to another female employee, Williams, the person who held the title of Senior Vice President of Operations for the Bank. Accordingly, Plaintiff is unable to establish a prima facie case of gender discrimination.

Even if the court were to address the similarly situated prong of the traditional prima facie case, Plaintiff still would not prevail. Indeed, Plaintiff was let go after the male executives were let go. If anything, this tends to show that she was actually treated more favorably than her male counterparts who were dismissed before her. Accordingly, ONB's motion for summary judgment with respect to Plaintiff's gender discrimination claim is **GRANTED**.

**B. Failure to Hire**

With respect to Plaintiff's failure to hire claim, Plaintiff again must proceed under the indirect burden shifting method. Thus, Plaintiff must show: (1) she is a member of the protected class; (2) she applied and was qualified for the position at issue; (3) she was nevertheless rejected for the position; and (4) the individual selected for the position was not a member of the protected group and was not better qualified. *See Johnson v. Nordstrom*, 260 F.3d 727, 732 (7th Cir. 2001).

At the time Plaintiff's job was eliminated, ONB had in place a published policy allowing employees to post for positions online through its website. (Defendant's Ex. B, Ex. 16; Affidavit of Anne Hayes, Defendant's Ex. L, Ex. 2). The policy was created "to inform associates of

openings and to identify qualified and interested candidates . . . .” (*Id.*). Plaintiff was both aware of this policy and understood that it allowed her to post for open positions. (Defendant’s Ex. B at 41-42). It was pursuant to this policy that the Bank posted the secondary marketing job on both the internet and on its intranet. (Defendant’s Ex. J, ¶ 6).

Given the Bank’s posting policy and the fact that the opening was indeed published in accordance with the policy, it was essential for Plaintiff to show she actually posted for the job if she wanted to create an inference that illegal sex discrimination played a part in the decision to hire Litcher. *Russell v. Eli Lilly & Co.*, 2002 U.S. Dist. LEXIS 21066, at \* 6-7 (S.D. Ind. Oct. 16, 2002) (citing *Howard v. Lear Corp. Eeds & Interiors*, 234 F.3d 1002, 1006 (7th Cir. 2000)). Plaintiff admits that she did not post for the position. This fact alone dooms her case.

Plaintiff attempts to skirt this material fact by arguing that she was discouraged from posting for the position. However, allegations that an employer discouraged a plaintiff from applying for a position and led her to believe she had no chance of getting the opening do not relieve an employee from her obligation to show that she applied for the position. *Russell*, 2002 U.S. Dist. LEXIS 21066, at \*7; *Wilkerson v. Menard, Inc.*, 2009 U.S. Dist. LEXIS 32111, at \* 15-26 (N.D. Ind. April 15, 2009) (fact that plaintiff “clearly expressed her interest” in a position did not relieve her from formally applying for the job); *see also Wanger v. G.A. Gray Co.*, 872 F.2d 142, 147 (6th Cir. 1989) (failure to formally apply fatal to employee’s discrimination case).

Plaintiff also contends that she was not given the pertinent information to post for the secondary marketing position. She explains that “she was not given [the job title and department information] until it appeared too late.” (Plaintiff’s Response at 14, ¶ 6). Plaintiff’s explanation is curious, as she admits that she interviewed candidates for that very position and indisputably

knew that Ryan was the hiring manager. Thus, Plaintiff's claim that she did not possess the information necessary to post for the position is simply not credible.

Plaintiff's claim fails for one additional reason; she has made no effort to establish that Litcher was not the better qualified candidate. *See Johnson*, 260 F.3d at 732 (plaintiff must initially show that the individual selected for the position was not better qualified); *Mlynczak v. Bodman*, 442 F.3d 1050, 1060 (7th Cir. 2006) (applicable standard required plaintiff to show that her qualifications were "clearly superior" and that "no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question."). Plaintiff nowhere challenges Litcher's qualifications, his lengthy career in the secondary marketing field, his broad experience in all aspects of the mortgage industry, or Ryan's conclusion that Litcher's unique skill set and experience best fit Ryan's vision for what he wanted from a secondary marketing manager. (Defendant's Ex. F, ¶¶ 12, 14, 16; Defendant's Ex. G at 12-17; Defendant's Ex. J, ¶ 11). She also makes no effort to compare her qualifications to those of Litcher – a comparison which was required if she was to meet her baseline burden of establishing that Litcher was not the better qualified candidate. Accordingly, ONB's motion for summary judgment on Plaintiff's failure to hire claim is **GRANTED**.

After reviewing resumes and interviewing candidates who had applied for the position, Ryan determined that Litcher was the best fit for the secondary marketing position. (Defendant's Ex. E at 49; Defendant's Ex. F, ¶ 16).

## **V. Conclusion**

For the reasons set forth below, the court **GRANTS** Defendant's Motion for Summary Judgment (Docket # 52) and **GRANTS** Defendant's Motion to Strike Plaintiff's Statement of

Material Facts (Docket # 65).

**SO ORDERED** this 9th day of February 2010.

*s/ Richard L. Young*  
RICHARD L. YOUNG, CHIEF JUDGE  
United States District Court  
Southern District of Indiana

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